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No. 02-857

IN THE

Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC.
and MBNA AMERICA BANK, N.A.,

Petitioners,

v.

SHARON R. PFENNIG,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT

Respondent, Sharon R. Pfennig, brought this class action against Petitioners, Household Credit Services, Inc. and MBNA America Bank, N.A, for failing to disclose the true cost of credit extended by Petitioners in violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.* and its implementing regulation, Regulation Z, 12 C.F.R. § 226.

Petitioners moved to dismiss Respondent's complaint, arguing that she failed to state a claim upon which relief could be granted because Regulation Z authorized Petitioners' conduct. The question before the Court is whether Respondent has alleged facts in her complaint that, if proved true, would entitle her to relief.

1. Respondent's Complaint. Respondent is a holder of Petitioners' credit card. *See* Complaint at ¶ 5. Petitioners established a credit limit of $2000 for this credit card. *See* Complaint at ¶ 34.

A "credit limit" represents the amount of credit the card issuer has pre-approved the consumer to obtain. In open-end consumer credit plans like the one at issue here, every purchase made by the consumer is its own "extension of credit" and must be disclosed as such. *See* 15 U.S.C. § 1637(b)(2). So, every time Respondent sought to make a purchase using her credit card, she requested that Petitioners make an extension of credit to her in the precise amount of the purchase. Generally, all requests up to the pre-set limit would be approved.

This case involves a request for an extension of credit that took Respondent beyond the stated $2000 credit limit.

Nothing in the underlying cardholder agreement prohibited Respondent from making that request. Likewise, nothing in the underlying cardholder agreement required Petitioners to approve it. However, in this instance, Petitioners chose to approve Respondent's request for the extension of credit that resulted in her exceeding her credit limit. *See* Complaint at ¶ 7.

After approving this request for an additional extension of credit, Petitioners charged Respondent a $29 fee for doing so. *See* Complaint at ¶ 8. This charge was labeled an "Overlimit Charge Assessment" and was posted to Respondent's account as "Purchases and Other Charges" on which additional financing charges are calculated. *See* Complaint at ¶ 9. In other words, Respondent was charged $29 plus interest for the extension of credit authorized by Petitioners. The cost of this authorized extension of credit was never disclosed as part of the finance charge as required by TILA and Regulation Z. *See, e.g.*, Complaint at ¶¶ 9, 36, 39.

Petitioners answered Respondent's complaint by arguing that Regulation Z allows them to exclude from the finance charge a fee denominated an "over-the-limit" fee. However, the regulation excludes from the finance charge fees imposed for unilateral acts of default, not authorized extensions of credit. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1. Therefore, if Petitioners authorized the extension of credit to Respondent as alleged in her complaint, the cited regulation does not apply.

2. The Purpose of TILA and Regulation Z. TILA is a consumer protection statute intended to guarantee that the

true cost of credit is disclosed to consumers so as to enable them to make informed choices in the credit marketplace. *See* 15 U.S.C. § 1601 ("The informed use of credit results from an awareness of the costs thereof by consumers.").

"The Truth in Lending Act has the broad purpose of promoting 'the informed use of credit' by assuring meaningful disclosure of credit terms' to consumers." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980).

> The 1967 Committee Reports [accompanying TILA] explained that "by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit [to] be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the costs of credit and to make the best informed decision on the use of credit."

See Anderson Bros. Ford v. Valencia, 452 U.S. 205, 220, n.17 (1981) (quoting H.R. Rep. No. 1040, 90th Cong., 1st Sess., 13; S. Rep. No. 392, 90th Cong., 1st Sess., 3). *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973) ("The Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'").

"Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Milhollin*,

444 U.S. at 559-560. This broad authority was designed to enable the Board to prevent circumvention of the cost disclosure requirements of the statute:

> Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion.

See Mourning, 411 U.S. at 365.

3. The Sixth Circuit's Decision. Respondent's complaint does not challenge the Board's authority. Based on the purpose and plain language of TILA and Regulation Z, the Sixth Circuit determined that the fee imposed by Petitioners, although characterized as an "over-the-limit" fee, is actually a finance charge in disguise. *See* Cert. Pet. App. A13. The court commented that this determination rested on Respondent's allegations that Petitioners *authorized* the extension of credit for which a fee was imposed:

> [C]onstruing the allegations in the complaint in the light most favorable to Plaintiff, she clearly alleges that Defendants had foreknowledge of her over-limit charges. In addition, these allegations support Plaintiff's argument that Defendants make the decision as to whether over-limit charges "will be permitted to go through." While the dissent

> claims credit card issuers "may not, in all cases" make such decisions, such a hypothetical scenario is not before us. Plaintiff has alleged in her complaint that Defendants routinely allow consumers to exceed their applicable credit limits. Thus, she has alleged that the ultimate decisions squarely rests in the hands of Defendants. Contrary to the dissent's contention, our holding is of course limited to those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit and then imposes a fee incident to the extension of that credit.

See Cert. Pet. App. A15 n.5.

Petitioners accuse the Sixth Circuit of "rejecting" the Board's authority by "substitut[ing] a fact-dependent test of its own making" for the bright-line test of the regulation. *See* Pet. Brief at 11. However, the court's limitation of its holding is consistent with TILA's description of a true "over-the-limit" fee and the Board's incorporation of this notion in 12 C.F.R. § 226.4(c)(2).

As the Government acknowledges, TILA describes an "over-the-limit" fee as a "fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to [the] account." *See* Gov't Brief at 2 (quoting 15 U.S.C. § 1637(c)(1)(B)(iii)). Consistent with this description, the Board excluded from the finance charge fees for unilateral acts of default such as exceeding a credit limit without the creditor's authorization. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1.

Therefore, if Petitioners authorized additional credit to be extended to Respondent as alleged in her complaint, by definition the fee imposed for this additional credit is not and cannot be an "over-the-limit" fee excluded from the finance charge. For the Sixth Circuit to draw this distinction based on the specific allegations of Respondent's complaint does not challenge the Board's authority.

SUMMARY OF ARGUMENT

Before this Court is a motion to dismiss. The core question is whether Respondent can prove any set of facts entitling her to relief under TILA. Respondent's complaint alleges that Petitioners authorized an extension of credit to her and imposed a fee for doing so. *See* Complaint at ¶¶ 7, 8. The complaint avers that this fee – a fee inextricably tied to an authorized extension of credit – is a finance charge pursuant to the express terms of TILA and Regulation Z. *See* Complaint at ¶ 35. These allegations, if proved true, demonstrate Petitioners' TILA violation. Therefore, per the pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), Respondent is entitled to try to prove her claim.

Respondent's complaint does not challenge the validity of Regulation Z. The Board's authority to exclude *all* fees imposed for "exceeding a credit limit" is not at issue here. Regardless of whether the Board could or would do so, section 226.4(c)(2) limits the exclusion to unilateral acts of default. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1. Since Respondent's complaint asserts that Petitioners authorized an extension of credit, this case does not trigger the exclusions listed in the regulation. Thus, a finding that

the subject fee, although portrayed as an "over-the-limit" fee, is actually a finance charge, is required by TILA and Regulation Z.

The Board itself recognizes that a fee imposed for an authorized extension of credit is a finance charge. This recognition stems from TILA's description of an "over-the-limit" fee as one imposed for an extension of credit "in excess of the amount of credit that is authorized to be extended[.]" *See* 15 U.S.C. § 1637(c)(1)(B)(iii). In excluding certain penalty fees from the finance charge, the Board carefully carved out exceptions for those where the creditor acquiesced in the would-be act of default. *See* 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1 and (c)(3). Thus, the question here is a factual one: Did Petitioners authorize Respondent to exceed her credit limit? Resolution of this question does not test the regulation's validity.

Ultimately, the challenge to the Board's authority stems from the Petitioners' insistence upon pressing a good faith conformity defense, relying on a regulation inapplicable to Respondent's complaint. The express terms of TILA and Regulation Z render this defense irrelevant because, based on the allegations made in the complaint, Respondent does not challenge any Board regulation.

ARGUMENT

I. RESPONDENT'S COMPLAINT SHOULD NOT BE DISMISSED UNDER THE SIMPLIFIED PLEADING STANDARD OF RULE 8.

Before this Court is a motion to dismiss Respondent's complaint. Thus, the only question here is whether she has alleged facts that, if proved true, could entitle her to relief.

This Court has long acknowledged that the Federal Rules do not require a plaintiff "to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47.

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz v. Sorema*, 534 U.S. 506, 514 (2002).

The complaint avers that Petitioners authorized an extension of credit to Respondent and imposed a fee for that

extension. *See* Complaint at ¶¶ 7, 8. Respondent alleges that this fee, albeit labeled an "overlimit charge assessment" fee, is a finance charge per the express language of TILA and Regulation Z. *See* Complaint at ¶¶ 31, 33. Having failed to disclose the fee as a finance charge, *see Id.* at ¶¶ 39, 40, Petitioners have violated TILA's disclosure requirements, thereby entitling Respondent to relief. *See* 15 U.S.C. § 1637(b)(4); 15 U.S.C. § 1640(a).

Petitioners respond to these allegations by arguing that Regulation Z permits creditors to exclude from the finance charge a fee for exceeding a credit limit. *See, e.g.*, Pet. Brief at 7. However, the cited regulation applies to fees imposed for unilateral acts of default, not *authorized* extensions of credit as alleged here. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1. The Government repeatedly acknowledges this fact. *See, e.g.*, Gov't Brief at 17 ("The Board's determination reflects that those fees are imposed only if the consumer violates the terms of the credit agreement."); 28 ("It is therefore reasonable to conclude that any OCL fee that is subsequently imposed is not 'incident to the extension of credit' but rather incident to the consumer's violation of the credit agreement.").

Resolution of this case rests on Respondent's ability to prove that Petitioners authorized the extension of credit for which she was charged the subject "over-the-limit" fee. Petitioners' insistence that they did not do so merely illustrates the factual dispute at issue here. Respondent's complaint may not be dismissed because she is entitled to adduce evidence in support of her claim. *See Scheuer*, 416 U.S. at 236.

II. REGULATION Z IS NOT CHALLENGED BY A FINDING THAT THE "OVER-THE-LIMIT" FEE IMPOSED IN THIS CASE IS A FINANCE CHARGE.

The Sixth Circuit recognized that Respondent's complaint does not allege she committed a unilateral act of default that resulted in the imposition of an "over-the-limit" fee. Quite the contrary: Respondent alleges that the transaction that allowed her to exceed the original $2000 limit, *i.e.*, the extension of credit at issue here, was *authorized* by Petitioners. *See* Complaint ¶¶ 7, 8. Relying on the plain language of the statute, its consumer protection purposes, and the allegations of the complaint, the court ruled that section 226.4(c)(2) does not apply to the specific facts alleged in this case. This ruling is correct.

A. THE EXPRESS LANGUAGE OF BOTH TILA AND REGULATION Z DEFINES "FINANCE CHARGE" TO INCLUDE FEES IMPOSED FOR *AUTHORIZED* EXTENSIONS OF CREDIT.

"[I]nterpretation of TILA and Regulation Z demands an examination of their express language[.]" *Milhollin*, 444 U.S. at 559. TILA defines a finance charge as "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." *See* 15 U.S.C. § 1605(a). As examples, Congress cites interest, points, service charges, etc. *Id.*

Regulation Z defines finance charge in virtually identical terms:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

See 12 C.F.R. § 226.4(a). Again, interest, points, service charges, etc., are cited as examples of finance charges. *See* 12 C.F.R. § 226.4(b).

Regulation Z also outlines a number of fees that are not finance charges. *See* 12 C.F.R. § 226.4(c). Specifically, the regulation excludes late fees, overdraft charges, and similar unilateral acts of delinquency or default by the debtor. *See* 12 C.F.R. § 226.4(c)(2) and (3). *See also* 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2).[1]

Considering the express language of TILA and Regulation Z, as well as the considerable deference due the Board, the Sixth Circuit recognized that Respondent's complaint asserts an *authorized extension of credit*, not a unilateral act of default, as necessary to trigger the exclusion of section 226.4(c)(2):

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1. Respondent's complaint does not challenge the Board's decision to exclude from the definition of "finance charge" fees imposed for unilateral acts of default. Since that question is not before the Court, there is no need to consider whether section 226.4(c)(2) is consistent with TILA.

> Plaintiff did not unilaterally exceed her credit limit. Rather, she requested additional credit in order to make purchases. Defendants could have declined her request. Instead, they granted it, and then charged her a $29.00 fee for doing so.

See Cert. Pet. App. A13. The court concluded that the exclusions of section 226.4(c)(2) simply do not apply here. This conclusion rests not on a determination that the regulation is ultra vires but on the acknowledgement that the facts as alleged here do not involve the type of unilateral default that section 226.4(c)(2) covers.

B. THE BOARD'S AUTHORITY TO EXCLUDE ALL "OVER-THE-LIMIT" FEES FROM THE FINANCE CHARGE IS NOT AT ISSUE IN THIS CASE.

The Government frames the question presented in this case as one involving the Board's ability to classify *all* "over-the-limit" fees as "other charges" rather than as finance charges. *See* Gov't Brief at I. *See also* Pet. Brief at 26. This question is not properly before the Court. Regardless of whether the Board may impose such an all-or-nothing classification, it simply has not done so in Regulation Z.

The express language of section 226.4(c)(2) excludes from the finance charge fees imposed "for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence." *See* 12 C.F.R. § 226.4(c)(2). Reading this section to exclude *all* fees imposed for "exceeding a credit limit" conflicts with the statutory canon *ejusdem generis*.

"Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001). Here, the phrase "exceeding a credit limit" should be read to embrace limitations similar to those placed on fees imposed for "late payment," "delinquency," and "default," *i.e.*, only fees imposed for exceeding a credit limit *without* the issuer's authorization are excluded from the finance charge. Significantly, Regulation Z itself adopts this rule of construction, as section 226.4(c)(2) lists various acts of default and then "similar" occurrences. The Board's Commentary also supports this reading. *See* 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1 (where creditor acquiesces in would-be act of default, subsequent fee may be finance charge).[2]

Under this rule of construction, section 226.4(c)(2) excludes from the finance charge only fees imposed for *acts of default*. Petitioners concede as much. *See* Pet. Brief at 7 ("Although the original regulation did not expressly address "over-the-limit" fees, the Board and its staff nevertheless interpreted the regulation as excluding such fees from the finance charge on the ground that "over-the-limit" fees were a type of delinquency or default charge."). *See also* Gov't Brief at 17 ("The Board's determination [excluding "over-the-limit" fees from the finance charge] reflects that those fees are imposed only if the consumer violates the terms of the credit agreement.").

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2. This reading is the only one consistent with TILA's description of an "over-the-limit" fee as a "fee imposed in connection with an extension of credit in excess of the amount of credit *authorized to be extended* with respect to such account (emphasis added)." *See* 15 U.S.C. § 1637(c)(1)(B)(iii).

C. THIS CASE DOES NOT INVOLVE AN ACT OF DEFAULT.

Petitioners argue that a consumer's request to make a purchase that ultimately results in her exceeding her credit limit is necessarily an act of default because creditors do not have the real-time information necessary to instantaneously approve or deny that request. *See* Pet. Brief at 15 (it is "impossible for creditors to have precise, real-time knowledge that a particular charge will cause an account to exceed its credit limit."). This argument rests on facts that were not properly before the district court on a motion to dismiss, and thus not properly before this Court, thereby underscoring the sufficiency of the legal claim alleged. Additionally, the argument is contrary to everyday experience in the present-day market.[3]

In 1980, when section 226.4(c)(2) was promulgated, real-time authorization was not nearly as wide-spread as it is today. In most circumstances, merchants manually imprinted the consumer's credit card which was then mailed to the issuer along with the specific purchase information. The consumer was gone with the goods long before the issuer even knew a request for credit had been made. Since instantaneous authorization was not economically feasible for all transactions, the issuer elected to forego a real-time option to approve or decline a specific purchase in the majority of circumstances.[4]

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3. In any event, the creditor's inability to obtain what it believes is adequate real-time information may (or may not) be a reason to decline a request for additional credit, but it says nothing about whether that authorized extension of credit is an act of default.

4. "Floor limits" were established that required the merchant to obtain pre-approval for purchases over a certain dollar amount.

Times have changed. Today, consumers can dial-up automated systems to access up-to-the-minute information about their own accounts. The consumer can obtain the balance due, available credit, and a listing of transactions since the last billing statement. Although pending charges may not be itemized in the automated system, they are nonetheless deducted from the amount of credit available once the charge has been "authorized" by the issuer.[5] Thus, the precise amount of credit available to the consumer can be obtained at any given moment in the blink of an electronic eye.

More important for present purposes, when the consumer seeks to make a purchase, this real-time information is not only readily available, but regularly used by the *creditor* to authorize the request:

> When a consumer uses a Visa card or a MasterCard card to pay for goods or services, the accepting merchant relays the transaction information to the acquiring bank with which it has contracted. The acquirer processes and packages that information and transmits it to the network (Visa U.S.A. or MasterCard). The network then relays the transaction information to the cardholder's issuing bank, which approves the transaction if the cardholder has a sufficient credit line. Approval is sent by the issuer to the acquirer, which relays it to the merchant.

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5. If pending charges are not available from the automated system, the consumer need only follow the telephone prompts to reach a customer service representative who can access the information.

See United States v. Visa U.S.A., Inc., 2003 WL 22138519, *2 (2d Cir. September 17, 2003). Technological innovations have reduced this process to a mere matter of seconds, enabling issuers to review every request for credit, no matter how large or small. *Id.* at 334.

This real-time authorization process is triggered every time the consumer seeks to make a purchase, regardless of whether the requested extension falls within or beyond the credit limit.[6] Although the issuer may have contractual obligations to honor all requests up to the established limit, there is no obligation to authorize extensions that go beyond it. Since the issuer has the real-time option to approve or deny an extension that exceeds the credit limit, the consumer cannot be said to have unilaterally defaulted on her account merely by making the request. Where the issuer authorizes the extension, the consumer is not in default and any fee imposed for that credit must be disclosed as part of the finance charge.[7]

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6. On remand, Respondent intends to show that the instantaneous approval process was present in this case, namely, that Petitioners authorized the extension of credit that resulted in Respondent exceeding her credit limit.

7. Because this matter is before the Court on a motion to dismiss, the record contains no evidence with respect to the past or present operation of the credit card authorization process. On remand, Respondent is prepared to offer in evidence expert testimony of Professor James L. Brown of the University of Wisconsin-Milwaukee, former member of the Consumer Advisory Council, Board of Governors, Federal Reserve System (1979-1981). Mr. Brown is prepared to testify to each of the facts asserted here regarding the industry's authorization process.

D. THE BOARD RECOGNIZES THAT A FEE IMPOSED FOR AN AUTHORIZED EXTENSION OF CREDIT IS A FINANCE CHARGE.

Petitioners criticize the Sixth Circuit for drawing a distinction between unilateral acts of default and authorized extensions of credit. *See, e.g.*, Pet. Brief at 11 ("Having rejected the Board's classification of over-limit fees, the court of appeals substituted a fact-dependent test of its own making."). However, this distinction is mandated by TILA's description of an "over-the-limit" fee. As the Government concedes, a fee must be imposed for credit "in excess of the amount of credit *authorized to be extended*" in order to be an over-the-limit fee. *See* Gov't Brief at 2 (quoting 15 U.S.C. § 1637(c)(1)(B)(iii)).

This fact-specific test is echoed by the Board's exclusion from the finance charge of only those acts of default in which the creditor has not acquiesced. For instance, with late fees, only those imposed for "actual unanticipated late payment" are excluded from the finance charge. *See* 12 C.F.R. § 226.4(c)(2). The Board commented that while "[l]ate payment charges *can* be excluded from the finance charge[,]" where the creditor "allow[s] the late payment without demanding payment in full or taking other action to collect[,]" the charge may be a finance charge. *See* 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1 (emphasis added). In other words, only those imposed for unilateral acts of default are excluded from the finance charge.

Similarly, overdraft fees are excluded from the finance charge unless the parties agreed to the payment of items that

overdraw the account. *See* 12 C.F.R. § 226.4(c)(3) (finance charge excludes "[c]harges imposed by a financial institution for paying items that overdraw an account, *unless* the payment of such items and the imposition of the charge were previously agreed upon in writing." (emphasis added)). Once again, where the creditor has acquiesced in what otherwise may appear to be an act of default, the fee imposed is a finance charge.

There is no reason to believe that the Board views exclusion of charges for exceeding a credit limit any differently from other would-be acts of default. In fact, the Board concedes that when "a charge denominated as an over-limit fee is in fact an expected charge for extending credit itself[,]" that charge is "an anticipated cost of the credit extension and therefore a finance charge under § 226.4(a)." *See* Pet. App. A50-A51 n.8.

Respondent's complaint specificaliy avers that Petitioners authorized an extension of credit to her and imposed a fee for doing so. *See* Complaint at ¶¶ 7, 8. Based on the allegations in this case, that fee is a finance charge and Petitioners' failure to disclose it as such is a violation of the Act. *See* 15 U.S.C. § 1637(c)(1)(B)(iii). *See also* 15 U.S.C. § 1637(b)(4); 15 U.S.C. § 1640(a).

III. IF THIS COURT AGREES WITH RESPONDENT THAT HER COMPLAINT SURVIVES A MOTION TO DISMISS, NO BOARD REGULATION IS AT ISSUE AND, THUS, THE GOOD FAITH CONFORMITY DEFENSE IS IRRELEVANT.

The Sixth Circuit inherently recognized that resolution of this case revolves around whether the subject fee was imposed for a unilateral act of default or an authorized extension of credit. Nonetheless, rather than reversing the dismissal of Respondent's complaint and remanding the matter for litigation of the underlying factual question, the court went on to grant Petitioners a good faith conformity defense under 15 U.S.C. § 1640(f). By doing so, the court resolved a key factual issue and unnecessarily invalidated section 226.4(c)(2).

Petitioners seem to believe that as long as they characterize this finance charge as an "over-the-limit" fee, they are guaranteed to escape liability by claiming they complied in good faith with Regulation Z. *See* Pet. Brief at 6. ("creditors who act 'in good faith conformity with any rule, regulation, or interpretation thereof by the Board' are immune from civil liability, even if the rule, regulation or interpretation is later 'amended, rescinded, or determined by judicial or other authority to be invalid for any reason.'"). This belief overlooks the need to prove *actual conformity* with a regulation that authorizes Petitioners' conduct. *See, e.g., Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1364 (11th Cir. 2000) (citing *McGowan v. Credit Ctr., Inc.*, 546 F.2d 73, 77 (5th Cir. 1977)) (creditor must "demonstrate reliance upon [the Board's] regulations and commentaries before it can successfully invoke TILA's 'good faith' defense.").

A good faith conformity defense necessarily rests on a regulation that allows the specific act or omission that has been challenged. Since section 226.4(c)(2) does not exclude from the finance charge a fee imposed for an *authorized* extension of credit, as alleged in Respondent's complaint, Petitioners have no applicable regulation on which to rest their proposed defense.

Assuming, *arguendo*, that this case involved allegations that Respondent exceeded her credit limit *without* Petitioners' authorization, Petitioners would have no liability and the good faith conformity defense need not be reached. As discussed above, section 226.4(c)(2) and its Commentary provide that fees imposed for unilaterally exceeding a credit limit are not finance charges. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2). Petitioners' failure to disclose as a finance charge an "over-the-limit" fee for that *unauthorized* act of default would not violate TILA's disclosure requirements per the express terms of the regulation. The factual determination of good faith conformity would only arise if a court were to invalidate a portion of the regulation (which neither side is advocating).

Here, however, Petitioners cannot cite a single provision of Regulation Z that excludes from the finance charge fees imposed for an *authorized* extension of credit that takes the consumer beyond her credit limit. To the contrary, the Board has stated that when "a charge denominated as an over-limit fee is in fact an expected charge for extending credit itself[,]" that charge is "an anticipated cost of the credit extension and therefore a finance charge under § 226.4(a)." *See* Pet. App. A50-A51 n.8. Thus, based on the allegations

of Respondent's complaint, the regulation with which Petitioners must comply requires disclosure of the fee as a finance charge.

The fact that Petitioners may have misinterpreted section 226.4(c)(2) is irrelevant. A creditor's "honest and reasonable but mistaken interpretation" of a regulation does not trigger the protection of the good faith defense. *See Hendley v. Cameron-Brown Company*, 840 F.2d 831, 834 (11th Cir. 1988) (quoting *Cox v. First Nat'l Bank of Cincinnati*, 751 F.2d 815, 825 (6th Cir. 1985)) ("Section 1640(f) 'does not protect a creditor who *fails* to conform with a regulation or interpretation through an honest, good faith mistake (emphasis in original).'"). Thus, if Respondent succeeds in proving that the extension of credit at issue was authorized by Petitioners, section 226.4(c)(2) cannot be used to shield them from liability.

Finally, as noted above, for the good faith conformity defense to be applicable, a court would necessarily have to conclude that section 226.4(c)(2) is invalid. To do so would undermine the very deference to the Board that Petitioners advance.

"This Court has held that the regulations and interpretations of the Board and its staff under TILA should be 'dispositive' unless 'demonstrably irrational.'" *See* Gov't Brief at 8-9 (quoting *Milhollin*, 444 U.S. at 565). This standard stems from Congress' desire to vest the Board with broad authority to prevent evasion of the core disclosure requirements of TILA. *See Mourning*, 411 U.S. at 371.

Here, Petitioners characterize their imposition of a finance charge as an "over-the-limit" fee hoping to avoid

proper disclosure of the true cost of the extension of credit. This is precisely the type of evasion the Board was empowered to prevent. In fact, the Board has rejected such efforts to circumvent the purposes of the Act by distinguishing fees imposed for unilateral acts of default from those tied to authorized extensions of credit. *See* 12 C.F.R. § 226.4(c)(2); 12 C.F.R. Part 226, Supp. I, Official Staff Commentary at § 226.4(c)(2)-1.

Undeniably, Respondent's complaint alleges that Petitioners *authorized* the extension of credit for which they imposed this "Overlimit charge assessment." *See* Complaint at ¶¶ 7, 8. If these allegations prove true, after submission of appropriate summary judgment evidence or a trial on the merits, Petitioners have violated TILA's disclosure requirements. *See* 15 U.S.C. § 1637(b)(4); 15 U.S.C. § 1640(a). Respondent is entitled to attempt to prove this violation.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed, as modified to make clear that because Respondent's complaint does not seek invalidation of section 226.4(c)(2), no good faith defense is relevant, and remanded for further proceedings on the merits.

Respectfully submitted,

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